exemption clause. It might have been different if the servant or agent had been merely negligent or inadvertent, see *Smackman* v. *General Steam Navigation Co.* [8]; *Ashby* v. *Tolhurst* [9] at p. 253 by Sir Wilfrid Greene, M.R., and *Swan Hunter and Wighan Richardson Ltd.* v. *France Fenwick Tyne & Wear Co. Ltd.* [10] at pp. 1030-1032.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs.

Appeal dismissed.

Solicitors: *Lawrence, Messer & Co.; Ingledew, Brown, Bennison & Garrett.*

PUBLIC PROSECUTOR v. TAN KOOI CHOON

[A. Cr. J. (Smith J.) April 13, 1959]

[K. L. — Criminal Appeal No. 66 of 1958]

Fisheries Enactment, 1937 — Maintenance and use of fishing stake without licence — Fishing stake erected outside territorial waters — Fisheries Rules, 1938, r.2(i).

Waters and Watercourses — "Inland waters," "tidal waters" and "territorial waters" — Meaning of — Civil Law Ordinance, 1956, s.3 — English common law.

A person who maintains a fishing stake outside territorial waters is not maintaining a fishing stake in tidal waters for the purposes of the Fisheries Enactment, 1937.

In this case the respondent pleaded guilty to a charge of maintaining and using a fishing stake in tidal waters contrary to r. 2(i) of the Fisheries Rules, 1938 punishable under section 11 of the Fisheries Enactment, 1937. The evidence for the prosecution showed that the unlicensed fishing stake was found by the Deputy Fisheries Officer in the sea more than three miles from the nearest low water mark. On the facts the Magistrate refused to convict him, and he was discharged.

Held: the charge in this case was incorrectly framed in alleging an offence in tidal waters and the respondent was correctly discharged.

The expression "territorial waters" is not defined in the Enactment and must therefore be taken to have the normal meaning assigned to it in English common law by virtue of section 3 of the Civil Law Ordinance, 1956. Territorial waters extend from low water mark to three miles out from the shore. Inland waters, by definition, are all rivers, etc. for that portion of their watercourse which is beyond the influence of tides. The logical inference is that tidal waters relate to that part of the sea from low water mark to high water mark and inland as far as the tide flows and reflows.

MAGISTRATE'S CRIMINAL APPEAL.

Mohamed Salleh bin Abas (Federal Counsel) for the appellant.

Respondent in person.

Smith J.: This is an appeal by the Public Prosecutor against the discharge of the respondent. The respondent was charged with the following offence:—

"That you on 25.5.58 at about 12.45 p.m., did maintain and use a fishing stake to wit a Blat Pok in tidal waters off Bagan Nakhoda Omar without a licence from the Officer-in-Charge contrary to Rule 2(i) of the Fisheries Rules, 1938, and punishable under section 11 of the Fisheries Enactment No. 20 of 1937."

The facts are that a Deputy Fisheries Officer was making a survey of fishing stakes at sea off Bagan Nakhoda and Sungei Pulai. He found an unlicensed fishing stake in the sea more than three miles from the nearest low water mark. From the map it appears the offence was not committed within an arm of the sea.

The respondent pleaded guilty to the charge but the learned Magistrate refused to convict on the ground that he had no jurisdiction. In his grounds he states:—

"As far as the Court is aware the territory of the State of Selangor off the coast is that part of the sea adjacent to the coast thereof which by international law constitutes the territorial waters of the State and that is the three miles limit. The Court cannot trace any law whereby jurisdiction may be exercised beyond territorial limits in respect of an offence under the Fisheries Enactment 1937. The Court therefore discharged the defendant."

The Enactment under which conviction is sought is one of the State of Selangor. The Fisheries Enactment, 1937, includes the following rule-making power:—

"14. (i) The Ruler in Council of each State may in respect of the State of which he is Ruler make rules for the purposes of this Enactment and not inconsistent with any of the provisions of this Enactment.

(ii) In particular and without prejudice to the generality of the foregoing power such rules may —

(a) regulate or prohibit except under or in accordance with the conditions of a licence the erection maintenance working repair and lighting of fishing stakes;

(b) regulate or prohibit except under or in accordance with the conditions of a licence any method of fishing or the use of fish traps or fishing nets;

.....

(f) prescribe the areas within or without territorial waters or within tidal waters or within inland waters and the periods of time within which any particular method of fishing is prohibited or restricted."

In exercise of those powers the Ruler of the State of Selangor made the Fisheries Rules, 1938, which include the following Rule 2(i):—

"No person shall in tidal or inland waters erect, maintain, use or have in his possession any kind of .... fishing stake ..... except under and in accordance with the terms of a fishing licence from the Officer-in-Charge."

The expression "inland waters" is defined in section 2 of the Enactment in the following terms:—

"'inland waters' includes all rivers creeks and streams for that portion of their water-course which is beyond the influence of tides and also fresh water lakes lagoons and ponds whether private or otherwise."

The expression "tidal waters" is defined in section 2 of the Enactment in the following terms:—

"'tidal waters' includes the sea and all rivers creeks streams lagoons ponds and other waters whether private or otherwise as far as the tide flows and re-flows."

The expression "territorial waters" is not defined in the Enactment at all and must there

fore be taken to have the normal meaning assigned to it in English Common Law by virtue of section 3 of the Civil Law Ordinance, 1956. According to Halsbury, 3rd edition, Volume 17, page 299, paragraph 511 note (f) "Great Britain, like most nations, claims an extent of one marine league (3 miles) measured from low water mark as being the limits of territorial waters." It was conceded by the Public Prosecutor that since the Federation has not yet acceded to the new international convention on jurisdiction over the territorial sea, the contiguous zone and the continental shelf, this particular fishing stake was situate without territorial waters.

In section 14(ii)(f) of the Enactment we find four areas of waters contrasted — (a) without (i.e. outside) territorial waters (b) within territorial waters (c) within tidal waters (d) within inland waters. Territorial waters appear to extend from low water mark to three miles out from the shore. Inland waters, by definition, are all rivers etc. for that portion of their water-course which is beyond the influence of tides. The logical inference is that tidal waters relates to that part of the sea from low water mark to high water mark and inland as far as the tide flows and re-flows. There is nothing in the definition of "tidal waters" in section 2 to suggest that "sea" as used in it means the oceans of the world. If that were intended there would be no need to provide for areas of sea "without territorial waters".

If I am right, therefore, in my deductions, a person who maintains a fishing stake outside territorial waters (as was the respondent in this case) is not maintaining a fishing stake in tidal waters for the purposes of this Enactment.

The rule relates to tidal and inland waters only and not to areas within or without territorial waters. The charge was incorrectly framed in alleging an offence in tidal waters and the respondent was correctly discharged. It is not necessary for me to consider whether or not section 14(ii)(f) is intra vires the legislature's powers where it purports to control activities "without territorial waters".

The appeal is dismissed.

Appeal dismissed.

PUBLIC PROSECUTOR v. RAMIAH & ORS.

[A. Cr. J. (Thomson C.J.) May 15, 1959]

[K. L. — Criminal Appeal No. 6 of 1959]

Penal Code s.454 — "Theft" and "larceny" — Difference between local law and English law.

This was an appeal against the acquittal of the first respondent who, with two others, was prosecuted for housebreaking in order to the committing of an offence of theft contrary to section 454 of the Penal Code. The facts were not in dispute and were as follows: on the morning of November 25, 1958 the three accused broke into the living room of the complainant and removed a trunk containing a large quantity of property. Some days later the trunk with its contents intact was found in the possession of one of them. The defence of the first respondent which was accepted by the President and was supported to some extent by the evidence of the complainant himself, was that the complainant owed him money and that he removed the property because he thought that if he kept it for a few days the complainant would pay the debt. He had no intention to steal. The defence of the other accused was that they thought the property was that of the first respondent and that they assisted him to remove it.

Held: on the facts the first respondent should have been found guilty of the offence charged against him.

Observations on the difference between local law of "theft" and English law of "larceny".

Case referred to:—

(1) *Queen-Empress* v. *Sri Churn Chungo* I.L.R. 22 Cal. 1017, 1021.

MAGISTRATE'S CRIMINAL APPEAL.

Mohamed Salleh bin Abas (Federal Counsel) for the appellant.

S. Sothi for the first respondent.

Appeal allowed.

Thomson C.J.: This appeal raises a short point concerning an important difference between our local law and the law of England.

The three accused in this case were prosecuted in the Sessions Court at Kuala Lumpur for house-breaking in order to the committing of the offence of theft in contravention of section 454 of the Penal Code. All three of them were found not guilty and discharged.

The facts are simple and have never been seriously in dispute.

On the morning of 25th November, 1958, the three accused broke into the living room of the complainant and removed a trunk containing a large quantity of property. Some days later the trunk with its contents intact was found in the possession of one of them. The defence of the first accused which was accepted by the learned President and was supported to some extent by the evidence of the complainant himself, was that the complainant owed him money and that he removed the property because he thought if he kept it for a few days the complainant would pay the debt. He had no intention to steal. The defence of the other two accused was that they thought the property was that of the first accused and that they had assisted him to remove it.

No complaint has been made regarding the acquittal of the second and third accused. The prosecution, however, have appealed against the acquittal of the first accused.

Larceny in English law is not the same as theft under the Penal Code. In particular it is an essential ingredient of larceny that there should be at the time of the taking an intention permanently to deprive the owner of the thing taken (see Larceny Act, 1916, section 1). On the view of the facts taken by the learned President there could thus be no question of what the first accused did amounting to larceny.